

# Judicial review in an integrated administration: the case of the Habitats Directive

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# Judicial Review in an Integrated Administration

## Judicial Review in an Integrated Administration: The Case of the Habitats Directive

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### I. Introduction

The right to an effective legal remedy is a generally accepted principle of modern legal systems and is enshrined in national constitutions as well as international treaties, such as the European Convention on Human Rights and Fundamental Freedoms.<sup>1</sup> On the EU level, the general principle of effective judicial protection was identified for the first time in the *Johnston* case,<sup>2</sup> and later came to be considered as general principle of Community law.<sup>3</sup> Lastly, the principle of effective judicial protection has been incorporated in Article 47 of the Charter of Fundamental Rights of the European Union.

The exercise of this right by individuals may sometimes be called into question, however, by the emergence of the system of shared administration. This system refers to situations in which decision-making is carried out through acts issued by European as well as national bodies through “multi-phase processes”. While the systems of decision-making are increasingly more intertwined, the system judicial review remains attached to a dualistic approach, which is based on a strict separation between the EU and the national level of jurisdictions.

The aim of this paper is to show how the operation of the system of shared administration may pose problems for the system of judicial accountability, ultimately creating gaps of judicial protection and, thereby, endangering the exercise of the right to an effective remedy. The analysis will be carried out using the case study of a piece of legislation which sets up a system of shared administration, i.e. the Habitats Directive,<sup>4</sup> and the German legal system, where a significant amount of litigation on this Directive took place. After an introduction to the system of shared administration and the Habitats Directive, for each stage of the decision-making, the paper will examine which form of judicial protection is guaranteed to individuals, and the gaps of judicial protection will be identified and discussed. Following this analysis, it will be shown which steps on European as well as on national level might be taken in the future in order to fill the currently existing of judicial protection.

### II. The Move Towards an “Integrated” Administration<sup>5</sup>

Traditionally, the schemes for the administrative implementation of European law have been categorized into direct and indirect administration, in accordance with the general framework of executive federalism.<sup>6</sup> Under this model, European law would mainly be implemented by the Member States through their national authorities, while in exceptional cases it would be the European institutions in charge of giving

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<sup>1</sup> See Articles 6 and 13 ECHR.

<sup>2</sup> Case 222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651. See, more recently, case C-432/05, *Unibet (London) Ltd, Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-2271, in which the Court held that “according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms” (para. 37). A similar consideration is made in case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft v Germany* [2010] ECR I-13849 (para. 29); case C-12/08 *Mono Car Styling* [2009] ECR I-6653, para. 49 (“whilst it is, in principle, for national law to determine an individual’s standing and legal interest in bringing proceedings, [EU] law nevertheless requires, in addition to observance of the principles of equivalence and effectiveness, that the national legislation does not undermine the right to effective judicial protection”). Further on this principle and its implications, see Sacha Prechal and Rob Widdershoven “Redefining the Relationship between ‘Rewe-effectiveness’ and Effective Judicial Protection”, *Review of European Administrative Law* (2011), 31-50.

<sup>3</sup> See e.g. Case C-125/01, *Peter Pflücke v Bundesanstalt für Arbeit* [2003] ECR I-9375.

<sup>4</sup> For a similar analysis with regard to the gaps of judicial protection in the system of plant protection products, see Andrea Keessen, “Reducing the Judicial Deficit in Multi-level Environmental Regulation: the Example of Plant Protection Products”, *European Energy and Environmental Law Review* (2007), 26.

<sup>5</sup> Please note that this section is included in an article by the same author entitled: “Judicial Review in an Integrated Administration: the Case of Composite Procedure”, currently under review with the *Common Market Law Review*.

<sup>6</sup> Jürgen Schwarze, *European Administrative Law* (Sweet and Maxwell, 1992), 25-47; Stefan Kadelbach, “European Administrative Law and the Law of a Europeanised Administration” in Christian Joerges and Renaud Dehousse (Eds.) *Good Governance in Europe’s Integrated Market* (Oxford University Press, 2002), 167; Jacques Ziller, Introduction – Les concepts d’administration directe, d’administration indirecte et de co-administration et les fondements du droit administratif européen in Jean-Bernard Auby et Jacqueline Dutheil de la Rochère (Eds.) *Traité de Droit Administratif Européen* (Bruylant, 2014), 327 ff.

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effect to European policies. Depicting in this way the current models of implementation of EU law, would, however, hardly do justice to its complexity and would, in particular, ignore the fact that increasingly more and more forms of cooperation have been set up across the different levels.<sup>7</sup> As has been argued, “it is difficult to identify an area of administrative activity in the EU which is purely either direct or indirect administration”.<sup>8</sup>

In particular, in the past years, several procedures have been set up in order to set in place mechanisms so as to enable cooperation in administering the different policy fields between EU institutions and Member States and amongst Member States themselves, to such an extent that it has been argued that nowadays a “relatively homogenous organizational phenomenon has emerged”.<sup>9</sup> This system has been described as one of shared or “integrated administration”, in order to convey the idea that supranational and national institutions cooperate and are linked together in the process of implementation of European law.<sup>10</sup>

While these developments have signified the departure from the tradition dichotomy between direct and indirect administration, these novel structures give rise to many legal problems with regard to “questions of governance that are unique to the project of European integration”.<sup>11</sup> These questions concern mostly the supervision of administrative action.<sup>12</sup> Controlling the operation of the EU integrated administration poses a significant challenge because the system of legal protection is based on a strictly dualistic approach, in the sense that measures of the EU legal system fall under the jurisdiction of the CJEU solely, while measures of national authorities would fall under the jurisdiction of the courts competent according to the rules of the legal system from which the challenged measure originates. Seen from a traditional point view of executive federalism, this system would imply that, in cases of indirect execution, private parties should be able to challenge national implementation measures before national courts (and there also possibly challenge the validity of the enabling European measure under the preliminary ruling procedure contained in Article 267 TFEU). Where instead the execution of EU law would be entrusted to the Commission, private parties would be given access to the European courts following the procedure of the action for annulment contained in Article 263 TFEU.<sup>13</sup>

This division of tasks is being put under challenge by the system of shared administration, because decision-making procedures are more and more often organized in a non-hierarchical structure, with different actors, participating at different stages and with different intensities, and often employing instruments of an informal nature. In the following, one example of procedure arising from the system of shared administration will be examined and the gaps of judicial protection will be identified.

### III. The Habitats Directive and Judicial Protection

The Habitats Directive (92/43/EEC)<sup>14</sup> is an example of an instrument creating a series of intertwined acts of legislative and administrative nature at both national and European level. The instrument itself is directed towards the Member States and aims at preserving and enhancing the biodiversity throughout the Union by means of designating certain areas as natural habitats which underlie strict protective measures.<sup>15</sup>

The procedure of designation is carried out in a three-step-procedure which is set out in Article 4 of the Habitats Directive.

Firstly, on the basis of criteria set out in the Directive, each Member State is obliged to propose a list of ecological sites which are, in the opinion of the Member State, of Community importance. Within three years of the notification of the Habitats Directive, that list has to be transmitted to the Commission, together with information on each site.<sup>16</sup>

<sup>7</sup> Hofmann claims that “this model has always been a simplification of reality”. Herwig C.H. Hofmann, “Composite decision making procedures in EU administrative law”, in Herwig C.H. Hofmann and Alexander H. Türk (Eds.), *Legal Challenges in EU Administrative Law* (Elgar, 2009), 137. The inadequacy of the dichotomy between direct and indirect administration had already been put in question in 2006 in Herwig C.H. Hofmann and Alexander H. Türk, “An introduction to EU administrative governance” in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance* (Elgar, 2006), 3.

<sup>8</sup> Herwig C.H. Hofmann and Alexander H. Türk, “Conclusions: Europe’s integrated administration” in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance*, 582.

<sup>9</sup> *Ibid.* 580.

<sup>10</sup> *Ibid.* 583.

<sup>11</sup> Herwig C.H. Hofmann and Alexander H. Türk “An introduction to EU administrative governance”, in Herwig C.H. Hofmann and Alexander H. Türk (eds.), *EU administrative governance*, 4.

<sup>12</sup> See also on this point, concerning agencies and comitology committees Deirdre Curtin, “Holding (Quasi-) Autonomous EU Administrative Actors to Public Account, *European Law Journal*”, (2007) *European Law Review*, 523-541. And generally see, Carol Harlow and Richard Rawlings, “Promoting Accountability in Multilevel Governance: A Network Approach” (2007) *European Law Journal*, 542-562.

<sup>13</sup> For a comprehensive introduction to both of these procedures and the system of judicial protection in the EU legal system, see Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (Fifth Edition, 2011, Oxford University Press).

<sup>14</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L-206/7 (hereafter: Habitats Directive).

<sup>15</sup> Article 2 Habitats Directive.

<sup>16</sup> Article 4(1) Habitats Directive. The procedure to adopt the list of sites is laid down in Article 21 of the Habitats Directive.

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Secondly, on the basis of these national lists, the Commission has to adopt a list of sites selected as sites of Community importance.<sup>17</sup> The Commission is given six years from the notification of the Habitats Directive to establish this list.<sup>18</sup> Finally, Member States are obliged to designate the sites in their territory as “special areas of conservation” as soon as possible and within six years at most.<sup>19</sup>

The Habitats Directive could, therefore, be characterised as a three-step procedure, with preparatory activities being carried out both at national and European level, and a final measure being adopted by the national authorities, as depicted in the figure below.



Article 6 of the Habitats Directive sets out the measures which the Member States are obliged to adopt in order to ensure the conservation and management of these designated sites.<sup>20</sup> These measures may affect the legal positions of landowners whose lands are part of a “special area of conservation”, since the measures may encumber the property rights of these landowners. The question thus arises as to which avenues of judicial protection these landowners have, theoretically, at their disposal.

First of all, these landowners have the theoretical possibility to challenge the list of sites of Community importance proposed by the Member States pursuant to Article 4(1) of the Habitats Directive before the national courts. Secondly, they could challenge the Commission Decision adopting the list of sites selected as sites of Community importance under Article 4(2) of the Habitats Directive before the European courts in an action for annulment under Article 263 TFEU. Finally, they have the possibility to challenge the final act of designation by the Member States required by Article 4(4) of the Habitats Directive before the national courts. In the course of that litigation, they could invoke the illegality of the European measure

and invite the national court to send a preliminary question of validity under Article 267 TFEU. These three options will be considered, and the possibility of obtaining judicial recourse against the measures taken in each of the steps of the designation procedure will be discussed in the following parts.

### 3.1 Step one: Member States' list

As mentioned above, the first step of the procedure is for the Member State to issue a list with proposals of areas which qualify under Annex III of the Directive based on purely scientific information.<sup>21</sup> In the following, the availability of judicial protection against the national list will be examined, using the case study of the German legal system.

#### 3.1.1. The German rules on reviewable acts...

In the German legal system, against the measure through which the Member States designate the areas which qualify as special protection areas, two actions could potentially be brought, namely, an action for annulment (*Anfechtungsklage*) and an action for a declaratory judgment (*Feststellungsklage*). The action for annulment, provided in Section 42 of the German Law of Administrative Court Procedure (VwGO), is aimed at depriving an administrative measure (a *Verwaltungsakt*) of legal effects. The declaratory

<sup>17</sup> Article 4(2) Habitats Directive.

<sup>18</sup> Article 4(3) Habitats Directive.

<sup>19</sup> Article 4(4) Habitats Directive.

<sup>20</sup> Under Article 6(1) of the Directive, Member States are obliged to establish the necessary conservation measures for the “special areas of conservation” with the aim to meet the ecological requirements of the natural habitat types and species present in the sites. Those measures may take the form of statutory, administrative or contractual measures or, if appropriate, management plans. Unlike Article 6(1) of the Habitats Directive, Article 6(2) to (4) applies once an area is placed on the list of sites of Community importance. According to Article 6(2) of the Directive, Member States must take appropriate steps to avoid the deterioration of the natural habitats as well as disturbance of the species for which the areas have been designated. With regard to Article 6(3), any plan or project which is likely to have a significant effect on the sites, has to be assessed according to its implications for the site with regard to the site’s conservative measures. The national authorities are allowed to agree on the plan or project only if it does not adversely affect the integrity of the site concerned. Nevertheless, even though a project has a negative effect on the site and in case there are no alternative solutions, a project can be carried out for imperative reasons of overriding public interest, including those of a social and economic nature. In this case, the Member State has to take compensatory measures to ensure the coherence with the Natura 2000 network. However, if the site hosts a priority natural habitat type, only considerations relating to human health or public safety may be raised.

<sup>21</sup> Article 4(1) Habitats Directive.

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action, provided in Section 43 of the VwGO is aimed, *inter alia*, at determining the nullity of an administrative act.<sup>22</sup>

The VwGO itself does not define the term *Verwaltungsakt*. Nevertheless, Section 35 of the German Law on Administrative Procedure (VwVfG) provides for a legal definition of it. This definition can also be used with regards to the provisions concerning judicial protection before the administrative courts. Pursuant to Section 35 VwVfG, a *Verwaltungsakt* is “any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and which is intended to have a direct external legal effect”.

In the German legal system, the measure by which Member States issue a list with a proposal of areas to be designated as protected areas pose problems from two perspectives in terms of availability of judicial protection, since it lacks both the “regulation” and the “external legal effects” aspects for it to be considered as a *Verwaltungsakt*.

The “regulation” criterion demands that, with the measure at issue, the administrative authority concerned aims at creating legal consequences, such as the setting up, modification and/or termination of rights and duties in an administrative law relationship.<sup>23</sup> Typical examples of measures with the “regulation” element are prohibitions, orders, permissions, denials of permissions etc. Measures that prepare a *Verwaltungsakt* are considered not to be administrative acts themselves because they do not set up, modify or terminate a legal relationship between the authority and the individual.<sup>24</sup>

A *Verwaltungsakt* must also be capable of having a “direct external legal effect”. This effect may be detected only when and in so far as the measure is aimed at legally affecting an individual’s legal sphere “outside” the administration.<sup>25</sup> This requirement excludes from the category of administrative acts those preparatory decisions that are relevant only within the administration, such as, for example, an inspector’s report upon which a decision for the granting of a planning permission is based.

### 3.1.2 ... and their application in practice

Based on these criteria, the German courts have consistently denied the claims of landowners who tried to challenge an administrative measure that had been issued by the competent Land authority and contained the list that was to be submitted to the Federal Ministry for Environment. The latter is entrusted, pursuant to the *Bundesnaturschutzgesetz* (i.e. the German law which implemented the Habitats Directive in the German legal system),<sup>26</sup> with compiling a document containing all the sites indicated by the Land administrations and with submitting the final list to the Commission.

The main line of argumentation followed by the German courts to reject the applicants’ claim was that

the measure by which the Land chose the potentially protected areas and communicated them to the Federal Ministry of Environment was to be considered as an internal administrative measure, functional to the final adoption of a final measure (i.e. the measure designating certain sites as protected areas).<sup>27</sup>

Parallel to the main argument that the mere proposal of the site does not have external effect, the German administrative courts also mentioned various other reasons to support the rejection of the claims.

It has been stated that the claimants were not directly concerned by the measures, a condition which can only be circumvented if the consequences are especially severe – a state which could not be proven by most claimants.<sup>28</sup> Additionally it has been laid out by the courts that economic considerations of the claimants are generally not to be taken into account whenever the proposal of the sites is at stake.<sup>29</sup> At this point only environmental criteria are being considered in order not to jeopardise the objectives of the Directive, namely a coherent network of protected sites, which only Commission is capable to create. The needs of the individuals are only to be taken into account at a later stage of the process, namely when the Member States may object to or accept the list

<sup>22</sup> For more information on the German system of remedies, see e.g. Ferdinand O. Kopp Wolf-Rüdiger Schenke Ralf Peter Schenke, *Verwaltungsgerichtsordnung: Kommentar* (2013, 19th Ed., Beck).

<sup>23</sup> BVerwG, Judgment of 20 May 1987, BVerwGE, 77, 268 (at 271).

<sup>24</sup> This category comprises, for example, the reports drawn up by experts belonging to an administrative authority, so long as they do not have binding value for the authority issuing the final decision. BVerwG, Judgment of 18 April 1969, BVerwGE, 32, 21; BVerwG, Judgment of 26 January 1996 – 8 C 19.94, NJW, 1996, 2046.

<sup>25</sup> BVerwG, Judgment of 25 October 1967, BVerwGE, 28, 145; BVerwG, Judgment of 22 May 1980, BVerwGE, 60, 144.

<sup>26</sup> Bundesnaturschutzgesetz vom 29. Juli 2009 (BGBl. I S. 2542), amended by Article 3 of the Law of 28 July 2011 (BGBl. I S. 1690).

<sup>27</sup> See e.g. VG Oldenburg, Decision of 20 January 2000 – 1 B 4195/99, NuR, 2000, 295, confirmed in appeal by OVG Niedersachsen, Decision of 24 March 2000 – 3 M 439/00, NuR, 2000, 298; VG Oldenburg, Decision of 2 February 2000 – 1 B 82/00, NVwZ, 2001, 349, confirmed in appeal by OVG Niedersachsen, Decision of 29 March 2000 – 3 M 666/00, NuR, 2000, 299; VG Düsseldorf, Judgment of 21 December 2000 – 4 K 6745/99, NVwZ, 2001, 591; VG Minden, Judgment of 4 September 2001 – 1 K 4082/00, unpublished, confirmed in appeal by OVG Nordrhein-Westfalen, Judgment of 14 May 2003 – 8 A 4229/01, unpublished.

<sup>28</sup> See e.g. VG Kassel, Judgment of 20 March 2001 – 4 TZ 822/01, NVwZ 2001, 1178.

<sup>29</sup> VG Frankfurt am Main, Judgment of 2 March 2001 – 3 LG 501/01, NVwZ 2001, 1188.

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issued by the Commission, taking into account economic, social and cultural considerations.<sup>30</sup> The same line of thought is followed in arguing that the judicial protection of individuals is also assured at a later stage of the designation process, hence there is no need to assure judicial protection in the first stage of the process.<sup>31</sup>

The arguments laid out above have continuously been upheld by the German administrative courts,<sup>32</sup> and confirmed by the German Federal Administrative Court (*Bundesverwaltungsgericht*),<sup>33</sup> thereby closing any possibility of judicial recourse against the first step of the decision-making process.

### 3.2 Step two: Commission decision of designation

As mentioned above, the list with the proposals for the protected areas are forwarded to the Commission which has to adopt an official list of special protection areas in the form of a decision pursuant to Article 288 TFEU.<sup>34</sup>

Decisions stemming from the Commission can be challenged before the CJEU by way of an action for annulment enshrined in Article 263 TFEU, which is the main mechanism for the judicial review of Union acts.<sup>35</sup> Due to the distinction into different classes of applicants, natural and legal persons, as, for example, landowners affected by a Commission decision of designation, have only a limited access to the European courts. According to Article 263(4) TFEU, applicants challenging a measure which is not addressed to them specifically, have to prove that the measure is of “individual and direct concern” to them or that the measure is a “regulatory act not entailing implementing measures” which is of direct concern to them.

Considering that the Commission designation measure necessarily entails a measure of final designation at the Member State level, the standing test introduced by the Lisbon Treaty for regulatory acts does not apply to the case at end, despite the Commission Decision at hand qualifying as a “regulatory act” in accordance with the definition provided by the case law of the CJEU.<sup>36</sup> The landowners who wish to challenge the Commission Decision will therefore have to prove individual and direct concern.

In the following, the concepts of individual and direct concern will be explained and the case law concerning the Habitats Directive will be reviewed in order to assess what the chances of success of landowners have been until the present day.

#### 3.2.1 *The standing rules before the European courts . . .*

The test of individual concern was elaborated upon by the CJEU in the *Plaumann* case and has remained virtually unchanged until the present day. This test prescribes that applicants will only have access to the court to challenge an EU measure, where they can show that they belong to a so-called “closed class”, which is differently affected by the challenged measure than all other natural or legal persons.<sup>37</sup> This is a very

high hurdle for private applicant to overcome, and has been much debated and criticized by doctrine.<sup>38</sup>

<sup>30</sup> *Ibid.*

<sup>31</sup> VG Schleswig, Judgment of 13 January 2000 – 1 B 104/99, NVwZ 2001, 348.

<sup>32</sup> See e.g.; VG Lüneburg, Judgment of 6 April 2000 – 7 B 7/00, NVwZ 2001, 590; VG Düsseldorf, Judgment of 21 December 2000 – 4 K 6745/99, NVwZ 2001, 591; OVG Bremen, Judgment of 31 May 2005 – 1 A 346/02, NVwZ, 2005, 654; BVerwG, Judgment of 12 June 2008 – 7 B 24/08, NVwZ 2008, 1011.

<sup>33</sup> BVerwG, Judgment of 7 April 2006 – 4 B 58/05, NVwZ 2006, 822; BVerwG, Judgment of 12 June 2008 – 7 B 24/08, NVwZ, 2008, 1011.

<sup>34</sup> Article 4(2) in conjunction with Article 21 Directive 92/43/EEC.

<sup>35</sup> For a comprehensive introduction to both of these procedures and the system of judicial protection in the EU legal system, see Paul Craig and Grainne de Burca, *EU Law: Text, Cases, and Materials* (Fifth Edition, 2011, Oxford University Press).

<sup>36</sup> See case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] nyr. For a discussion of the case law leading up to this ruling, see Haakon Roer-Eide and Mariolina Eliantonio, *The Meaning of Regulatory Act Explained: Are There Any Significant Improvements for the Standing of Non-Privileged Applicants in Annulment Actions?*, *German Law Journal* (2013), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1581>.

<sup>37</sup> For example, in a case concerning seven Greek cotton traders who sought judicial review of a Commission decision that authorized France to impose a fixed-term quota on cotton yarn imports from Greece to France, the Court found that pre-existing import contracts differentiated the applicant from *potential* importers and thus granted standing to the applicants. See case 11/82, *Piraki-Patraiki v Commission* [1985] ECR 207.

<sup>38</sup> For criticism on the standing requirements of individual applicants, see, ex multis, Angela Ward, “Locus Standi under Article 230(4) of the EC Treaty: Crafting a Coherent Test for a Wobbly Polity” (2003) *Yearbook of European Law*, 45; Anthony Arnall, “Private Applicants and the Action for Annulment since Codorniu” (2001) *Common Market Law Review*, 7; Jose Manuel Martin Cortés, “Ubi ius, Ibi Remedium? Locus Standi of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads” (2004) *Maastricht Journal of European and Comparative Law*, 233; A Abaquense de Parfouru, “Locus Standi of Private Applicants under the Article 230 EC Action for Annulment: Any Lessons to be Learnt from France?” (2007) *Maastricht Journal of European and Comparative Law*, 361; Adam Cygan, “Protecting the Interests of Civil Society in Community Decision-making: The Limits of Article 230 EC” (2003) *International and Comparative Law Quarterly*, 995; Xavier Lewis, “Standing of Private Claimants to Annul Generally Applicable European Community Measures: If the System is Broken, where Should it be Fixed?” (2006-2007) *Fordham International Law Journal*, 1496; Albertina Albors-Llorens, “Sealing The Fate of Private Parties in Annulment Proceedings? The General Court and the New Standing Test In Article 263(4) TFEU”, *Cambridge Law Journal*, 52.

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With regard to a potential challenge to a Commission decision of designation, the greater hurdle is, however, embodied in the requirement of direct concern, given the nature of the procedure and its multiple steps. The CJEU has consistently found that a measure will be of direct concern to the applicant when the latter's legal position has been directly adversely affected. In other words, there must be a direct link between the challenged measure and the loss or damage that the applicant has suffered.<sup>39</sup> Furthermore, the Court will deem a causation chain to be broken if the contested Community measure leaves any discretion to the addressees of the measure who are responsible for its implementation.<sup>40</sup>

3.2.2 ... and their application by the European courts  
By applying the tests of individual and direct concern described above, the European courts have consistently denied standing to applicants who tried to challenge a Commission Decision adopting the lists of sites of Community importance pursuant to Article 4(2) of the Habitats Directive by an action of annulment under Article 263 TFEU.

In the *Rasso Freiherr* case,<sup>41</sup> the applicants brought an action for annulment the Commission Decision 2004/69/EC of 22 December 2003 adopting the list of sites of Community importance for the Alpine bio geographical region.<sup>42</sup> The applicants exploited their forested lands by means of undertakings.<sup>43</sup> The same Commission Decision was challenged again in the *Kurt Martin Mayer* case.<sup>44</sup> In the case *Markku Sahlstedt*,<sup>45</sup> certain landowners and an association of framers and foresters brought an action for annulment before the CFI to challenge Commission Decision 2005/101/EC of 13 January 2005 adopting the list of sites of Community importance for the Boreal bio geographical region.<sup>46</sup> Finally, in the case *Robert Benkő and others*, the challenge was against the Commission Decision 2004/798/EC of 7 December 2004 which contained the list of sites of Community importance for the Continental bio geographical region.<sup>47</sup> Amongst the applicants, two of them had for many years led a project concerned with the creation of a small electric power station on one of the sites mentioned in the contested Decision. One of these two applicants was, in addition, the property's owner. The other applicants were owners of plots of land on sites which are the subject of the contested decision and operate there agricultural and forestry holdings.

In all these cases, the CFI adopted the same reasoning to deny standing to the applicants to challenge the above mentioned Commission Decisions by way of an action for annulment. In particular, having recalled its established case law on the notion of direct concern, it considered that an individual affected by a Community measure is considered to be directly concerned by it where the Community measure affects directly the legal sphere of the applicants and if the action to be taken by the

Member State to implement that measure is automatic. However, if the measure leaves the Member State free to decide whether or not to act, or does not require it to act in a specific way, it is the Member State's action or inaction which directly concerns the individual affected, and not the Community measure itself.<sup>48</sup>

With regard to the first condition of direct concern, the CFI held that the Commission Decision does not affect directly the legal situation of the landowners. Since the Commission Decision contains no provisions as regards the system of protection of sites of Community importance such as conservative measures or authorisation procedures, it does not affect the rights or obligations of the landowners or the existence of those rights. Consequently, the inclusion of those sites in the list of sites of Community importance imposes no obligations on economic operators or private persons.<sup>49</sup>

With regard to the second condition of direct concern, the CFI concluded that the Habitats Directive is only binding on the Member State as to the result to be achieved. It leaves it open to the Member States to choose the conservation measures to be undertaken and the authorisation procedures to be followed is left to the competent national authorities.<sup>50</sup> All obligations necessitate a measure on the part of the

<sup>39</sup> Cases 41-44/70 *International Fruit Company BV v Commission* [1971] ECR 411. In this case, employees of a merging company were not granted *locus standi* to challenge a Commission decision allowing the merger, due to the fact that possible employment terminations would not be the direct consequence of the Commission decision.

<sup>40</sup> See, for example, case 69/69, *Alcan Aluminium Raeren v Commission* [1970] ECR 385; case 222/83, *Municipality of Differdange v Commission* [1984] ECR 2889.

<sup>41</sup> Case T-136/04, *Rasso Freiherr von Cramer-Klett and Rechtlerverband Pfronten v Commission of the European Communities* [2006] ECR II-01805.

<sup>42</sup> OJ [2004] L-14/21.

<sup>43</sup> The first applicant was the owner of land in the site of Community importance set out in the contested Commission Decision. The second applicant was a corporation formed of the owners of lands in the site of Community importance.

<sup>44</sup> Case T-137/04, *Kurt Martin Mayer and Others v Commission of the European Communities* [2006] ECR II-01825.

<sup>45</sup> Case T-150/05, *Markku Sahlstedt and Others v Commission of the European Communities* [2006] ECR II-01851.

<sup>46</sup> OJ [2005] L-40/1.

<sup>47</sup> Case T-122/05, *Robert Benkő and Others v Commission of the European Communities* [2006] II-02939.

<sup>48</sup> Case T-150/05, *Markku Sahlstedt and Others v Commission of the European Communities* at para. 53. See also case T-223/01 *Japan Tobacco and JT International v Parliament and Council* [2002] ECR II-3259, para. 46.

<sup>49</sup> Case T-150/05, *Markku Sahlstedt and Others v Commission of the European Communities* at para. 54.

<sup>50</sup> *Ibid.* at para. 60.



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Member State concerned, in order to specify how it intends to implement the obligation in question, whether it relates to necessary conservation measures (Article 6(1) of the Habitats Directive), steps appropriate to avoid deterioration of the site (Article 6(2) of the Habitats Directive), or the agreement to be given by the competent national authorities to a project likely to have a significant effect on it (Article 6(3) and (4) of the Habitats Directive).<sup>51</sup> As a result, the Court of First Instance concluded that the applicants were not directly concerned by the Commission Decisions they were challenging.

Only the applicants in the *Markku Sahlstedt* case appealed to the Court of Justice by requesting it to set aside the order of the CFI and to annul the Commission Decision adopted pursuant to Article 4(2) of the Habitats Directive.<sup>52</sup>

Contrary to the CFI, in his opinion of 23 October 2008, Advocate General Bot concluded that the landowners were directly and individually concerned by the Commission Decision and that the case should be sent back to the CFI so that it could decide on the merits. In the view of Advocate General Bot, the contested decision directly affected the legal situation of the landowners for two reasons.<sup>53</sup>

Firstly, he argued that the Commission Decision constitutes a measure having adverse effects on landowners since it deprives them of their right to use their land as they wish.<sup>54</sup> The consequence of the Commission Decision is to encumber the landowner's property rights with new restrictions which were not existent at the time when they acquired their rights. In the AG's view, the Commission Decision can result in economic or social damage in the form of a decrease in the value of the land or even the total or partial cessation of farming or forestry activities.<sup>55</sup> Secondly, Member States have only a very limited discretion in the implementation of the Decision. First of all, it becomes clear from the wording of Article 4(4) of the Habitats Directive, that once the Commission has identified an area of land as a site of Community importance, the Member States have no margin of discretion to designate that site as a "special conservation area".<sup>56</sup> Furthermore, all measures such as conservation measures (Article 6(1) of the Habitats Directive) or steps appropriate to avoid deterioration of the site (Article 6(2) of the Habitats Directive) being directly linked to the classification of the landowners' property as sites of Community importance.<sup>57</sup> According to him, the fact that the Member States may enjoy discretion as to the conservation measure to be adopted does not have any significance with regard to the effects of the contested Commission Decision.<sup>58</sup>

After finding that the landowners are directly concerned, Advocate General Bot determined whether the landowners were individually concerned by the Commission Decision. Having recalled the requirement set out by the CJEU in order to determine individual concern, he concluded that the landowners

were part of a limited class whose members are especially affected by the contested decision based on three reasons.<sup>59</sup> Firstly, the landowners are in a special situation because they have property rights in areas of land covered by the contested decision. Secondly, the landowners were identifiable by the Commission at the time when it adopted the Decision pursuant to Article 4 (2) Habitats Directive. Thirdly, the contested decision affects the landowner's legal situation and the free exercise of their rights.<sup>60</sup>

Interestingly, the Court of Justice switched the order of examination of the standing requirements and, unlike the Advocate General, it held that the applicants were not individually concerned.<sup>61</sup> The Court recalled that the fact that it is possible to determine more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that that measure must be regarded as being of individual concern to those persons where it is established that that application takes effect by virtue of an objective legal or factual situation defined by the measure in question.<sup>62</sup>

The Court of Justice held that the Commission Decision adopted pursuant to Article 4(2) of the Habitats Directive was of concern to the appellants only in so far as they had property rights in the lands covered by some of the sites of Community interest. Consequently, the Commission Decision affects them by virtue of an objective legal or factual situation defined by the Commission Decision and not in accordance with criteria specific to the category of landowners. Moreover, the Commission Decision was

<sup>51</sup> *Ibid.* at para 59.

<sup>52</sup> Case C-362/06 P, *Markku Sahlstedt and Others v Commission of the European Communities* [2009] ECR I-02903.

<sup>53</sup> Opinion of Advocate General Bot delivered on 23 October 2008 [2009] ECR I-02903, paras. 64-77.

<sup>54</sup> *Ibid.* at para. 69.

<sup>55</sup> *Ibid.* at para. 70.

<sup>56</sup> *Ibid.* at para. 90.

<sup>57</sup> *Ibid.* at paras. 71- 73.

<sup>58</sup> *Ibid.* at para. 100.

<sup>59</sup> *Ibid.* at para 110.

<sup>60</sup> *Ibid.* at paras. 111-119.

<sup>61</sup> Case C-362/06 P, *Markku Sahlstedt and Others v Commission of the European Communities* [2009] ECR I-02903. For a critical comment to this ruling, see Ludwig Kraämer, "Comment on case C-362/06 P, Sahlstedt and Others v. Commission – Judgment of the Court of Justice (Second Chamber), 23.4.2009", *Journal of European Environmental and Planning Law* (2009), 411-415.

<sup>62</sup> Case C-362/06 P, *Markku Sahlstedt and Others v Commission of the European Communities* [2009]. See also Case C-451/98, *Antillean Rice Mills v Council* [2001] ECR I-08949, para. 52; case C-96/01 P, *Galileo and Galileo International v Council* [2002] ECR I-04025, para. 38; Case C-503/07 P *Saint-Gobain Glass Deutschland v Commission* [2008] ECR I-02217, para. 70.



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not adopted in the light of the specific situation of the landowners. Consequently, the Commission Decision could not be regarded as a group of individual decisions addressed to each landowner.<sup>63</sup> As a result, the Court of Justice held that the applicants did not have standing to challenge the Commission Decision on the basis that the applicants were not individually concerned and without considering whether they were directly concerned by the Commission Decision.

In conclusion, according to the case law of the European courts, no action lies against the Commission measure of designation of certain national areas as special protection areas, because of the lack of individual and direct concern.

### 3.3 Step three: Member States' final designation

As a last step in that designation process the Member State has to officially designate the special protection area identified in the Commission decision.<sup>64</sup> In the following, the possible avenues of judicial protection in the German legal system will be examined and their chances of success will be analysed.

#### 3.3.1 The German rules on available remedies ...

In the German legal system there is a set of different possibilities for individuals to challenge the final measure of designation by the national authorities.

The primary means in order to challenge the final designation is the *Normenkontrollverfahren* in which a national norm is examined as to its validity with regards to a higher ranking rule of law.<sup>65</sup> The availability of this procedure depends on whether a *Land* has approved its integration into its own legal system; if so, the procedure is governed by the conditions set out in Section 47 VwGO.

In cases in which the Member State have a relatively wide margin of discretion when giving effect to the EU legislation, the higher ranking rule of law can be the German Basic Law, and, for the purposes of the situation under examination, Article 14 thereof on property rights.<sup>66</sup> Nevertheless, in the majority of cases concerning the Habitats Directive, the Member States will not have such a significant margin of discretion. In such cases, the relevant higher-ranking norm can be one stemming from primary and secondary European Union law.<sup>67</sup> For the present purpose, this would mean that the European Union principle of a right to property as guaranteed in Article 17 of the European Charter on Fundamental Rights could be invoked.

Next to the *Normenkontrollverfahren* concerned landowners have the possibility to invoke another procedure in the context of challenging the final designation, namely the action for performance (*Verpflichtungsklage*).<sup>68</sup> The landowner seeks to acquire permission for a certain activity (provided the activity requires prior permission according to the Habitats Directive) and upon denial issued by the administrative authorities appeals against this decision.<sup>69</sup>

As a final possibility, the individual can have resort to the *Feststellungsklage* (action for declaration) provided in Section 43 VwGO. This procedure can be used whenever the individual plans activities on the property which do not require prior permission, but which are nonetheless potentially hazardous.<sup>70</sup>

#### 3.3.2 ... and their chances of success

The *Normenkontrollverfahren* is a procedure of objective control which could in principle be open to landowners against the final determination of designation of an area as a special protection area. It is however hardly going to be successful since it will be hard for the applicants to prove that the measure of determination as such infringed on their right to property as enshrined at EU level.<sup>71</sup>

As regards the *Verpflichtungsklage* and the *Feststellungsklage*, while both avenues would be open in principle to applicant, they would be of only limited use.

Concerning the *Verpflichtungsklage*, since the potential measure of denial which the applicant could be challenging, can only be based on the criteria predefined in the Habitats Directive, the only way in which the final designation decision can *effectively* be challenged is by way of a referral to the Court of Justice.<sup>72</sup> This is rooted in the fact that the margin of

<sup>63</sup> Case C-362/06 P *Markku Sahlstedt and Others v Commission of the European Communities* [2009] at para. 32-34.

<sup>64</sup> Art. 4(4) Habitats Directive.

<sup>65</sup> Section 47 VwGO.

<sup>66</sup> See e.g. BVerfG, Judgment of 27 July 2004 – 1 BvR 1270/04, NVwZ, 2004, 1346.

<sup>67</sup> Wolfgang Kahl and Klaus F. Garditz, "Rechtsschutz im europäischen Kontrollverbund am Beispiel der FHH-Gebietsfestsetzung", *Natur und Recht* (2005), 563.

<sup>68</sup> Section 42 VwGO; Wolfgang Kahl and Klaus F. Garditz, "Rechtsschutz im europäischen Kontrollverbund am Beispiel der FHH-Gebietsfestsetzung", 563.

<sup>69</sup> § 42(1) VwGO.

<sup>70</sup> Wolfgang Kahl and Klaus F. Garditz, "Rechtsschutz im europäischen Kontrollverbund am Beispiel der FHH-Gebietsfestsetzung", 563.

<sup>71</sup> See e.g. case Joined cases C-20/00 and C-64/00, *Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v The Scottish Ministers* [2003] I-07411, where the CJEU held that "fundamental rights are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights" (para 68).

<sup>72</sup> Wolfgang Ewer, "Rechtsschutz gegenüber der Auswahl und Festsetzung von FFH-Gebieten", *Natur und Recht* (2000), 361-362.

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discretion of the Member States is close to inexistent, which means that final measures of designation could only be challenged on grounds of invalidity of the underlying Commission Decision. Because no national court is empowered to decide over the validity of said instrument,<sup>73</sup> the only possibility for applicants to *de facto* challenge a final measure of designation is by asking the national court to refer a question of validity to the CJEU.

Similarly, with regards to the *Feststellungsklage*, the procedure (which would aim at determining that the individual is allowed to pursue certain dangerous activities) would only serve as a way of incidentally contesting the validity of the criteria set out in the Community list stemming from the Commission which itself needs to adhere to primary and secondary EU law – an assessment which eventually can only be carried out by the CJEU.<sup>74</sup>

In conclusion, landowners affected by the inclusion of their property in the list of “special protection areas” have access to national courts to challenge the final measure of designation, but only as a gateway to access the European level through the preliminary ruling proceedings. The main problem regarding the questionable efficiency of challenging the final designation decision lies in the inexistent leeway of the Member State’s authorities. Due to the lacking margin of discretion on part of the Member State the national court’s freedom in coming to a decision on the validity of the final designation decision is significantly curtailed, and the final decision on the validity of the national designation thus *de facto* lies in the hands of the CJEU in case the national administrative court decides to refer the matter.

### 3.4 Back to step two? Indirect challenge of the Commission Decision before the national court

In case an applicant would gain access to court in a challenge against the designating decision of the Member State under the Habitats Directive, it becomes possible to challenge the validity of the inclusion of the concerned site into the list of special protection sites as determined by the Commission decision. In fact, the CJEU has been very keen on stressing that “the judicial protection of natural or legal persons who are unable, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 230 EC, to challenge directly Community measures ... must be guaranteed effectively by a right of action before the national courts”.<sup>75</sup> In case such a question of validity is actually raised before a national court, the national court, if it entertains doubts as to the actual lawfulness of the contested measure, has the obligation to refer a preliminary question to the Court of Justice, as it is only this court that has the power to annul EU measures.

Although the preliminary ruling procedure fulfils the task of judicial protection in the way that it grants

individuals a means to question allegedly invalid EU acts, it is debatable whether preliminary ruling is an adequate substitution for direct means of judicial protection such as Art. 263 TFEU. Hence, even where individuals can bring an action before the national courts, the mechanism of preliminary rulings does not always guarantee an effective remedy to applicants.<sup>76</sup>

Indeed, several problems (many of which have been highlighted by AG Jacobs in his opinion on the *UPA* case)<sup>77</sup> can be observed with regard to the idea of national courts being a correct forum for cases in which the validity of EU legislation is in question.

In particular, as AG Jacobs considered, national courts are only competent to assess whether the applicant’s arguments “raise sufficient doubts about the validity of the impugned measure to justify a request for a preliminary ruling from the Court of Justice”.<sup>78</sup> Furthermore, AG Jacobs observed that access to the CJEU via the preliminary reference procedure is not available to applicants as a matter of right, since national courts (with the exclusion of courts of last instance) may refuse to refer a question of validity of an EU measure to the CJEU or might err in their assessment of the validity of the measure and decline to refer a question to the CJEU on that basis.<sup>79</sup> In addition, even where a reference is made, the preliminary questions are formulated by the national courts, with the consequence that applicants’ claims might be redefined or that the questions referred might limit the range of measures whose validity is being challenged before the national court.<sup>80</sup> Furthermore, one may add, the actual communication on issues of European law entirely occurs between the national court and the Court of Justice in preliminary rulings proceedings. The parties that raised the question on Community law do not have a party status before the Court of Justice.

<sup>73</sup> Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 04199.

<sup>74</sup> Wolfgang Ewer, “Rechtsschutz gegenüber der Auswahl und Festsetzung von FFH-Gebieten“, 361-362.

<sup>75</sup> *Sahlstedt*, para. 43.

<sup>76</sup> Cornelia Koch, “*Locus Standi* of private applicants under the EU constitution: Preserving gaps in the protection of individual’s right to an effective remedy”, *European Law Review* (2005), 515; Jose-Manuel Cortés Martín, “*Ubi ius, Ibi Remedium?* – *Locus Standi* of Private Applicants under Article 230(4) EC at a European Constitutional Crossroads”, *Maastricht Journal of European and Comparative Law* (2004), 239.

<sup>77</sup> Case C-50/00, *Unión de Pequeños Agricultores (UPA) v Council of the European Union* [2002] ECR I-06677.

<sup>78</sup> Opinion of Advocate General in *UPA*, para 41. In this context, Brown and Morijn also correctly mention the potential disparities which may arise from different evaluations by the national courts. See Christopher Brown and John Morijn, “Case C-263/02 P, *Commission v. Jégo-Quéré & Cie SA*” (2004) *Common Market Law Review*, 1650-1651.

<sup>79</sup> Opinion of the AG in *UPA*, para 42.

<sup>80</sup> *Ibid.*

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Finally, AG Jacobs in his opinion in the *UPA* case considered that proceedings brought before a national court are more disadvantageous for individuals compared to an action for annulment under Article 263 TFEU, since they involve delays and extra costs. The negative effects of the potential delay might be avoided by granting the applicant adequate interim measures. National courts have the jurisdiction to do so (on the basis of the ruling in *Zuckerfabrik*)<sup>81</sup> but, as the AG pointed out, the decision of whether to grant interim measures is subject to discretionary conditions by the national courts and is anyway effective only within the legal system in which the measure is ordered, thus obliging the applicant to bring multiple actions in all Member States in which their interests are affected by the contested measure.<sup>82</sup> This stands in contrast with the power of the European courts, under Article 278 TFEU and 279 TFEU, to grant EU-wide interim measures.

In conclusion, once having gained access to national courts against the final measure of designation, individuals have the chance to indirectly challenge the Commission decision of designation through the preliminary ruling proceedings; however, as shown above, one cannot consider the preliminary ruling as an adequate substitute for effective judicial protection of landowners who claim to be adversely affected by the Commission decision of designation.

### IV. Conclusions and Recommendations

The analysis of Directive 92/43/EEC and the example of the German system of judicial protection have shown that the system of shared administration may bring about significant gaps of effective judicial protection. Closely intertwined administrative procedures between the Commission and the national administrative bodies create a complex system of decision-making to which the system of judicial protection has not been able to keep up.

As shown above, when the administrative acts are of preparatory, internal nature thus lacking external binding effect, individuals are *a priori* barred from contesting those acts. Relying on the main argument that the measure containing the national lists of sites to be sent to the Commission is, as such, not capable of changing a landowner's legal sphere, the German courts have consistently denied access to applicants who wished to challenge the first step of the designation process prescribed by the Habitats Directive.

Towards the legally binding decisions by the Commission, severely restrictive standing requirements pose a fairly high hurdle to direct claims of validity. The European courts have, to date, always denied claims by landowners against the Commission Decisions of designation on the grounds, mostly, of lack of direct concern, with the argument that, given

the presence of a further step in the decision-making process at national level, there is no direct link between the applicant's change of position and the Commission Decision.

The denial of access to court at European level problem is only partially resolved through the possibility of access to the national courts in a challenge against the final measure of designation. As shown above, national courts, when being confronted with a challenge against the final designation decision, do not have sufficient leeway to decide on the validity of the national measure, as the latter ultimately merely transposes the underlying Commission Decision. This means that the only way to obtain a judicial protection is by way of having the case referred to the European Court of Justice for a preliminary ruling. The recourse to the indirect review of the Commission Decision does not seem, however, to be an adequate substitution of a direct challenge, since there is no guarantee that the national court will refer the case to the Court of Justice, and the procedure will entail more time and costs for an individual if compared to a direct action.

The real crux of the problem, therefore, lies in the nature of the decision-making process, i.e. a typical example of the system of shared administration, in which the judicial protection mechanisms currently in existence seem to have trouble to allocate responsibility for a the content of a decision. While Member State courts (the German ones, in the case under examination) seem to think that the responsibility for the decision lies with the Commission, the opposite seems to be true for the European courts.

Given the unsatisfactory nature of this situation, the question arises as to how these gaps may possibly be filled. At first glance it may seem as though a change of the national courts attitude *vis-à-vis* the concept of reviewable would be the easiest and most suitable step to achieve a more complete protection for individuals. What constitutes a reviewable act at Member States level is, in principle, determined by national procedural rules, in application of the principle of national procedural autonomy.<sup>83</sup> However, in *Oleificio Borelli*, the CJEU held that a national measure which prevented legal action from being taken against a mere administrative preparatory act would be in violation of the right of access to justice.<sup>84</sup> In this case, an Italian firm, sought the annulment of a Commission measure, on the grounds that the under-

<sup>81</sup> Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v Hauptzollamt Itzehoe and Zuckerfabrik Soest GmbH v Hauptzollamt Paderborn* [1991] ECR I-415.

<sup>82</sup> Opinion of the AG in *UPA*, para 44.

<sup>83</sup> Case 33/76 *Rewe* [1976] ECR 1989; case 45/76, *Comet* [1976] ECR 2043.

<sup>84</sup> Case C-97/91, *Oleificio Borelli S.p.A. v Commission of the European Communities* [1992] ECR I-6313.

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lying measure adopted by the competent national authority was void. The CJEU ruled that, while it had no jurisdiction to rule on the unlawfulness of a measure adopted by a national authority, the negative opinion issued by the national authorities should have been challenged before a national court and that the requirement of effective judicial protection obliges the Member States, “to regard an action brought for that purpose as admissible even if the domestic rules of procedure do not provide for this in such a case”.<sup>85</sup>

While this requirement imposed by the European courts seems to fill the possible gaps of judicial protection, it does leave some questions open. First of all, there is no assurance that national courts, misapplying the national procedural rules to the contrary, will admit claims against national preparatory measures. Individuals may forget to rely on this case law before the national courts and courts themselves may be unaware of or unwilling to apply the European requirements. In the German case law discussed above, for example, neither did the applicants rely on this case law, nor did the courts discuss it of their own motion. Furthermore, reliance on national courts’ willingness to set their own procedural rules aside may bring about a certain lack of legal certainty as well as the risk of unacceptable differential treatment if national courts would come to different conclusions in case of the same or similar preparatory measures taken in the context of composite procedures.

Alternatively, it could be a desirable goal to modify the application of the standing requirements for individuals under to bring a direct action under Article 263(4) TFEU. Even where the current interpretation of the concepts of individual and direct concern were to be maintained, it is submitted that, in the case of landowners wishing to challenge the Commission Decision of designation, the requirements should be deemed as met.

Indeed, as AG Bot considered in his opinion in the *Sahlstedt* case, the Commission Decision deprives landowners of their right to freely use their land, resulting possibly in economic or social damage, with Member States having only a very limited discretion in the implementation of the Decision. Furthermore, even in application of the strict *Plaumann* criteria, it can hardly be denied that, because of the property rights acquired before the designation of the area as a special protection area, the landowners are in a peculiar situation *vis-à-vis* other landowners and were identifiable by the Commission at the time when it adopted the Decision.

A final solution might be to modify Article 267 TFEU and place the national courts under an obligation to refer a question to the Court of Justice

in all cases in which the validity of an EU measure is contested. Apart from the fact that this solution may not solve the problems connected to the increased time and costs for applicants *vis-à-vis* a direct action, as Brown and Morijn correctly point out, this would be a deeply unattractive scenario: the Court of Justice would be then be swamped with questions coming from the national courts “thus finding itself in precisely the position it seeks to avoid with its individual concern case law – an extremely heavy case load”.<sup>86</sup>

More in general, the system of “integrated administration” requires the necessity to depart from the strict dualistic approach to judicial review. As has been observed, the current mechanism of preliminary ruling only works vertically (i.e. from national courts to EU and not between national courts) and only one way (never from EU to national courts).<sup>87</sup> As this paper has shown, the traditional two-level structure clashes with the reality of decision-making which is more and more organized in a network structure, and the existence of the preliminary ruling in its current form does not fully serve to fill the existing gaps. Hence the necessity to use the same network structure for the judicial supervision of the administrative action. A possibility to adapt judicial review to the system of integrated administration would be by setting up a system whereby “judicial review could be undertaken by one court with supervision of all participants in the administrative network”,<sup>88</sup> possibly by the court competent according to the procedural rules of the legal system to which the authority which took the final decision belongs. In the case of the Habitats Directive, landowners could be able to bring a claim against the final measure of designation, with the European courts being able to supervise the application and interpretation of the Directive by the national court. This, would, however, imply a recognition of the intertwined nature of the systems of judicial review of national and European courts and a final farewell to, on the one hand, national sovereignty on the organization of the judiciary, and, on the other hand, to the current monopoly of the European courts on the interpretation and application of EU law.

<sup>85</sup> *Ibid.* para. 13.

<sup>86</sup> See Brown, C. and Morijn, J. (2004) “Comment on *Jégo-Quéré*”, 1652.

<sup>87</sup> Also observed by Herwig C.H. Hofmann “Decision making in EU Administrative Law – The Problem of Composite Procedures”, *Administrative Law Review* (2009), 213-214.

<sup>88</sup> *Ibid.*, 214.